In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 278.

WILLIAM PRESSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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TABLE OF CONTENTS.

Reply Brief of Petitioner 1

Conclusion 10

TABLE OF AUTHORITIES.

Cases.

Sparks v. U. S., 90 F. 2d 61 (6th Cir. 1937) 8

U. S. v. Moran, 194 F. 2d 623, *cert. den.* 343 U. S. 965 ..... 4, 5

Statutes.

Title 2 U. S. C. § 190(b), Senate Resolution 74 ..... 7, 8

Rules.

Federal Rules of Civil Procedure, Rule 45(a) 7, 8

Federal Rules of Criminal Procedure, Rule 17(a) 7, 8

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1. A substantial reason petitioner's writ should be granted is that assuming the proper names on the invoice were removed and the document which contained a list of those names was withheld, the proper names bore no reasonable relation to the subject under inquiry by the Committee. That this is true appears from the testimony of Senator McClellan, wherein he states that the question was the use of union dues for the payment of Christmas gifts (43a).

(a) There is no support in the entire record in this case to justify the statement that both aspects of pertinency were amply met" by the Government. If, as stated by Senator McClellan, the question under inquiry by the Committee was the use of union dues money for Christmas gifts then clearly the Committee had all of the data of

Joint Council 41 that bore on that subject before September 9, 1958 (137a; 175a; 176a; defendant's Exhibit B, 319a; 320a; 321a).

The response of Senator McClellan to the question put by the trial court (43a) after petitioner's objection to testimony regarding those eight proper names had been sustained (42a), indicates the scope of the subject under investigation by the Committee. Therefore, even if the Committee had not obtained the list of eight names, which it actually did (69a; Government's Exhibit 10, 315a), the investigation of the Committee would not have been impeded or obstructed.

The significance of the Senator's testimony is not that it supports the assertion of the Government that both aspects of pertinency were met, but the contention of the petitioner that no act of his obstructed or impeded the exercise of the Committee's due and proper power of inquiry.

(b) The petitioner does not contend that the statute was not violated "because the information was ultimately obtained by the Committee from other sources." The petitioner contends that the testimony of the chairman of the committee (43a) discloses that the Committee was not at all interested in the proper names listed on the Deutsch invoice and the accompanying paper.

Whether or not the Congressional ban set out in the statute is limited to "successful obstruction" seems to be beside the point because the attempt to impede or obstruct is otherwise limited by the statute to the due and proper exercise of the law under which the proceedings are being had, or the due and proper exercise of the power of inquiry under which the investigation is being conducted. There was no attempt (or endeavor) to impede or obstruct any legitimate activity of the Committee under the statute.

2. The Government characterizes the subjects upon which the Chairman of the Committee testified, with a reference to the record where such testimony may be found, and concludes that the petitioner's various objections to the Chairman's testimony are groundless. Of special interest here is the characterization of Senator McClellan's testimony as the "manner in which the Committee had been obstructed by the acts of the petitioner (P. A. 41-46)."

During the course of the trial the Government attempted to convey to the jury the Committee's interest in those individuals whose names appeared on the demanded documents by reading from the Committee's Interim Report the ex parte conclusions of the Committee about those individuals (42a). Inasmuch as the Committee's investigations, which resulted in its conclusions of the Interim Report, did not concern the petitioner and were concluded sometime before Sheridan served a subpoena on Joint Council 41 (25a, 58a), the trial court properly sustained the petitioner's objection to such evidence as being immaterial to the charges made against the petitioner (42a).

The court, who erroneously treated pertinency as a matter of fact (36a), compounded his error by permitting Senator McClellan to invade the province of the jury by concluding from his testimony from the Interim Report that the Committee would be obstructed or impeded in its business if it had not gotten the names on the demanded documents at the time of Sheridan's second visit.

The prejudice of this testimony to the petitioner is readily discernible from a consideration of the use to which it was originally applied by the prosecutor and the use to which the Government is presently attempting to apply it. The prosecutor originally claimed that this testimony was evidence of the bad reputation of the petitioner's associates

(344a). It is now contended that this testimony was relevant to the questions of pertinency and motive (Brief, p. 13). If the question under inquiry by the Committee was the use of union dues for payment of Christmas gifts (43a), Senator McClellan's comments, based upon the conclusions in the Interim Report concerning six recipients of a gift in one year, could have no logical bearing upon the propriety of the practice of using union dues for gifts. The practice of giving gifts was instituted by Joint Council 41, and was in effect, some years before petitioner became President of Joint Council 41, and continued in effect as an authorized practice for several years following 1955 (Defendant's Exhibit G, 224a, 232a).

(a) The petitioner has not changed his position upon appeal or in this petition from that taken at the trial. The issue of pertinency is a part of the Government's case and must be ruled upon by the trial court as a matter of law. The petitioner objected to the testimony of Senator McClellan on those matters which the Government contends it was introduced to prove pertinency at the trial (35a, 36a, 37a). The prejudice to the petitioner resulted from the trial court's refusal to recognize his obligation to determine the issue of pertinency as a matter of law (35a, 36a).

The petitioner did not object to the instruction offered by the Government because such an objection at that point of the trial would have been futile. The prejudice to the petitioner of permitting the testimony of Senator McClellan to go to the jury as evidence of pertinency had been completed at the time that the Government asked the court to determine that issue as a matter of law.

The instance referred to by the Government (*U. S. v. Moran*, 194 F. 2d 623, *cert. den.* 343 U. S. 965) in which the probative value of evidence of pertinency was sub-

mitted to the jury does not warrant the categorical statement that the submission of that issue to the jury in the trial of the petitioner was not error, or at least was probably favorable to the petitioner.

First of all the trial court did not consider that the issue of pertinency was a mixed question of law and fact (35a, 36a).

Second, the assertion that the trial court implicitly ruled on the matter of pertinency by overruling petitioner's motion for acquittal is completely without foundation. The trial court was very explicit in overruling petitioner's motion for acquittal when he stated that, while he knew it was not the law he felt the trial court had no right to direct a verdict of acquittal in a criminal case (214a).

Third, the *Moran* case is not analogous to that of petitioner because, unlike Moran, at no time during his trial did the petitioner request that the question of pertinency be submitted to the determination of the jury.

(b) The petitioner contends that the testimony of Senator McClellan (45a, 46a) was prejudicial to a fair trial because (1) it purported to relate to pertinency and pertinency was a question of law for the court and not a question of fact for the jury; and (2) the conclusions of Senator McClellan usurped the function of the jury even if pertinency were a question of fact.

(d) The characterization of the recipients of the gifts was clearly prejudicial to the rights of the petitioner. First of all the investigation from which the Committee characterized the recipients had been concluded before the Committee investigator served his subpoena on Joint Council 41. Second, the investigations which formed the basis of the Interim Report did not involve the petitioner. Third, the characterization of the recipients was arrived at

from the ex parte statements of investigators who were not subject to cross examination (52a) at the time their testimony was given. And fourth, the characterization of the recipients was given to the jury in the petitioner's trial as ultimate and conclusive facts as proof of the pertinency of those names to the subject then under inquiry by the Committee.

(e) It is true, as asserted by the Government, that the record does not show that the testimony of Senator McClellan who read the transcript of the testimony of Sheridan before the Committee was offered to corroborate Sheridan. At the trial the Government claimed that it was offered to verify the pertinency of certain matters which Sheridan would testify to before those matters were placed into evidence directly (35a). If there is a difference between prior corroboration and verifying the pertinency of certain matters before they are put into evidence the difference is not without prejudice to the petitioner.

The fact that the transcript did not go to the jury room is absolutely no test of the prejudice that resulted to the petitioner of this evidence which was submitted for the jury's consideration.

The petitioner in his testimony did dispute the facts as Sheridan is reported to have testified before the Committee. The petitioner's main defense was that he was not guilty of any of the acts charged against him. If the documents were torn or missing that circumstance alone was no proof that petitioner had torn or secreted the documents because he was away from his office most of the time before Sheridan's visits and he did not have exclusive control of the documents involved during that time (165a).

The direct conflict between petitioner and Sheridan was their testimony as it related to Sheridan's visits to the

office of Joint Council 41. Both Sheridan and the petitioner knew of the practice of giving receipts for materials of Joint Council 41 that was in effect between the Joint Council 41 and the Committee Field Office (96a, 227a, 228a).

Sheridan's notes could not be considered as corroborative of his trial testimony because of the conflict that existed between his testimony and that of the petitioner. However, characterizing the notes as the chief corroboration of Sheridan's testimony is a tacit admission on behalf of the Government that Senator McClellan's testimony was, in fact, meant to corroborate Sheridan.

3. To obstruct the due and proper exercise of its power of inquiry the Committee must be investigating some subject of which the witness must be apprised. To manifest its desire to examine a witness or certain documents the Committee is required to proceed in accordance with the authority which has created it and limits its scope of activity (Tit. 2 U. S. C. Sec. 190b; Sen. Res. 74, Gov. Ex. 5-6, 312a; Gov. Ex. 6, 313a).

As a general statement, and under certain circumstances which do not appear in this case, mutilating documents may constitute obstruction of justice even though those documents are not under subpoena. However, in those instances where this general statement is applicable the proceedings are judicial in nature, and a knowledge of the proceeding accompanied by any attempt to thwart the judicial process is clearly obstruction of justice.

However, a Congressional investigating committee is not a judicial tribunal and the issuance of subpoenas by such committees is not governed either by Rule 17(a) of the Fed. R. of Crim. P. or Rule 45(a) of the Fed. R. of Civ. P. Whether or not the practice of the Committee in

this regard is the same as the practice in Federal courts under the express grant of Rules 17(a) and 45(a) certainly is not dispositive of the validity of the subpoena involved in this case. Title 2 U. S. C. § 190(b), Senate Resolution 74 (Government's Exhibit 5-C, 312a) and Rule 4 of the Rules of Procedure of the Committee (Government's Exhibit 6, 313a) should be the petitioner's guarantee of his rights before the Committee in the same manner that Rules 17(a) and 45(a) provide for blank subpoenas as a litigant's guarantee of his right to compel the attendance of witnesses in his own behalf.

To say that after Sheridan demanded the subject documents the petitioner had knowledge that the Committee wanted those documents completely begs the question. It is the petitioner's contention that a valid subpoena issued by the Committee is the source of petitioner's knowledge of the demands of the Committee and the extent of the petitioner's obligation toward the Committee. It was at the trial that it was disclosed that the Committee did not issue the subpoena (213a).*

4. The vice of the testimony of Senator McClellan is clearly displayed in the quotation from the prosecutor's final argument to the jury. Although the court purported to limit the use of the testimony of Senator McClellan concerning those persons referred to in the prosecutor's argument (43a) neither the Government nor the jury respected the limitation.

The prosecutor's argument makes it crystal clear that the testimony of Senator McClellan (41a-47a) was offered

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* A completely analogous principle obtains regarding unlawful searches and seizures. The validity of a search warrant is always relevant and resistance to a search under an invalid warrant is neither illegal nor obstruction of justice. *Sparks v. U. S.*, 90 F. 2d 61 (6th Cir. 1937).

and used by the Government to prove to the jury that some of the people (those listed on the invoice) in the Teamsters Union have bad reputations and that the petitioner removed those names from one document and withheld the other to conceal his association with these people of bad reputation (344a).

After this refusal by the prosecutor to respect the limitation placed upon Senator McClellan's testimony by the trial court (43a), the Government now asserts that the petitioner has no cause for complaining because he failed to request the trial court to limit this testimony of Senator McClellan (Brief, p. 17) and argues that the testimony was properly admissible to prove pertinency (Brief, p. 13).

That the jury did not respect the court's limitation of Senator McClellan's testimony cannot be doubted.

According to the prosecutor (349a), the trial court (328a) and the court of appeals (Petition, 34), the most damaging evidence against the petitioner was that of Charles Schaeffer. The Government now contends that its prosecutor's interpretation of Schaeffer's testimony was fair and that the trial court reached this same conclusion (Brief, 17 and 18). Schaeffer testified that he called the Rudolph Deutsch Company and asked that company whether it had *any* bills or invoices of sales to the Teamsters or the petitioner and, if so, he (Schaeffer) "would like to have duplicate copies of **them**" (209a).

The prosecutor's fair interpretation of this witness consisted of his argument to the jury that Schaeffer contacted the Rudolph Deutsch Company "for the purpose of obtaining Rudolph Deutsch's copy of the records of these gifts" (341a); three years after the original transaction the petitioner, through Schaeffer, attempted to get "the other copies of those records" (342a); and the petitioner,

through Schaeffer, fraudulently tried to get "the copy from the files of the Rudolph Deutsch Company" to make sure that he covered his tracks (349a).

When the trial court concludes that the unfair distortion of Schaeffer's testimony was actually the true testimony, the effect of the distortion upon the jury must be great.

5. The issues involved in this case are not confined within the narrow limitation of whether or not the petitioner mutilated or withheld a document. The propriety of the actions and procedures of an investigating committee as against the rights of a citizen is the broad issue involved in this case which escaped the trial court and the jury.

CONCLUSION.

For the reasons set forth in the petition for a writ of certiorari and herein, it is respectfully submitted that the writ for certiorari should be granted.

Respectfully submitted,

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